No. 12-6615

IN THE SUPREME COURT OF THE UNITED STATES

HEDELITO TRINIDAD Y GARCIA, PETITIONER

v.

LINDA THOMAS, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

STUART F. DELERY
Principal Deputy Assistant
Attorney General

ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Suspension Clause of the United States Constitution, Art. I, § 9, Cl. 2, is violated when a habeas court declines to evaluate the Secretary of State's determination under the Convention Against Torture and its implementing statute and regulations that a fugitive is not more likely than not to be tortured if extradited.

2. Whether substantive due process gives a fugitive the right to judicial review of the Secretary of State's determination that he is not more likely than not to be tortured if extradited.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-110a) is reported at 683 F.3d 952. The court of appeals' panel opinion (Pet. App. 112a-119a) is not published in the Federal Reporter but is reprinted at 395 Fed. Appx. 329. The order of the district court (Pet. App. 120a-133a) is unreported but is available at 2009 WL 4250694.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2012. On August 10, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including

October 6, 2012. The petition for a writ of certiorari was filed on October 4, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns petitioner's effort to obtain judicial review of the Secretary of State's determination that his extradition will not violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, and its implementing statute and regulations. In 2003, the United States filed a complaint seeking petitioner's extradition to the Philippines to face a charge of kidnapping for ransom. A magistrate judge found probable cause to believe that petitioner committed the charged offense. Pet. App. 134a-169a. On habeas review, a district court determined that petitioner is subject to extradition and that petitioner's claim under the Torture Convention was not ripe for review until the Secretary of State determined to extradite petitioner. Id. at 122a-123a.

Petitioner submitted materials to the Secretary of State in support of his torture claim, and the Secretary decided to extradite petitioner. Petitioner then filed a second petition for a writ of habeas corpus claiming that he is likely to face torture if he is extradited to the Philippines and seeking relief based on

the Torture Convention, federal law, and substantive and procedural due process. Pet. App. 120a-133a. On appeal, the en banc court of appeals held that, although habeas jurisdiction exists to consider petitioner's claim, petitioner's right to judicial review of his claim under the Torture Convention and its implementing regulations would be fully satisfied if the Secretary of State furnishes a declaration that the decision to surrender petitioner complies with the United States' obligations under the Torture Convention. The court concluded that the separation of powers and settled rules prohibiting judicial inquiry into the treatment of a fugitive in the requesting state precluded further review of the Secretary's determination. The court also held that petitioner's substantive due process claim was foreclosed by Munaf v. Geren, 553 U.S. 674 (2008). The court remanded for the Secretary to submit an appropriate declaration, in accordance with the government's representation that she would provide such a declaration if the court so instructed. Pet. App. 3a-6a.

1. a. Pursuant to 18 U.S.C. 3184, when the government files a complaint charging a person in the United States with having committed a crime in a foreign state covered by an extradition treaty, a judge may issue an arrest warrant for the fugitive. If the judge determines that the government's "evidence of criminality" is "sufficient to sustain the charge under the provisions of the proper treaty," then the judge "shall certify

* * * to the Secretary of State" that the Secretary may issue a surrender warrant. Ibid. A judge's certification that an extradition warrant may issue is not subject to direct appeal. In re Metzger, 46 U.S. (5 How.) 176, 191 (1847); see also Oteiza v. Jacobus, 136 U.S. 330, 333-334 (1890). But this Court has permitted habeas review of extradition certifications, limited to determining whether the judge "had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." Fernandez v. Phillips, 268 U.S. 311, 312 (1925).

Thereafter, the decision whether to surrender the fugitive is committed to the Secretary of State. 18 U.S.C. 3186 (providing that the Secretary of State "may" deliver the fugitive to the foreign government after issuance of an extradition certification). Under longstanding principles, the Secretary of State's decision to surrender a fugitive despite claims that the fugitive will face mistreatment in the requesting state is not subject to judicial review. See Neely v. Henkel, 180 U.S. 109, 122 (1901) (United States constitutional protections do not apply in foreign prosecutions); Munaf, 553 U.S. at 700 ("Habeas corpus has been held not to be a valid means of inquiry into the treatment the [fugitive] is anticipated to receive in the requesting state.") (citation omitted). Courts refer to this limitation on habeas

review as the "rule of non-inquiry." See, e.g., United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997). That rule respects the unique province of the Executive Branch to evaluate claims of possible future mistreatment at the hands of a foreign state, its ability to obtain assurances of proper treatment (if warranted), and its capacity to provide for appropriate monitoring overseas of a fugitive's treatment. If the Secretary of State finds these protections adequate, "[t]he Judiciary is not suited to second-guess such determinations." Munaf, 553 U.S. at 702. "It is not that questions about what awaits the [fugitive] in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." Kin-Hong, 110 F.3d at 111.

b. In 1984, the United Nations General Assembly adopted the Torture Convention. Article 3 of the Torture Convention provides that no state party shall "extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[1] That article directs the "competent authorities," in making that determination, to "take

[1] In providing its advice and consent, the Senate stated its understanding that the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" means "if it is more likely than not that he would be tortured." 136 Cong. Rec. 36,198 (1990).

into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." Torture Convention art. 3.

The Senate gave its advice and consent to the Torture Convention subject to the declaration that "Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. 36,198 (1990). Thus, "[t]he reference in Article 3 to 'competent authorities' appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. * * * Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts."[2] S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 17-18 (1990).

c. In implementing Article 3 of the Torture Convention, Congress enacted Section 2242 of the Foreign Affairs Reform and

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[2] This statement from the Senate Foreign Relations Committee's report on the Torture Convention recommended that the Senate make its advice and consent contingent on a declaration that the phrase "competent authorities," as used in Article 3 of the Torture Convention, refers to the Secretary of State in extradition cases and the Attorney General in immigration cases. S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 17-18 (1990). The Senate did not adopt that declaration. Congress nevertheless made clear that it understood those administrative officials to be the competent authorities when it enacted the Foreign Affairs Reform and Restructuring Act of 1998. See pp. 6-7, infra.

Restructuring Act of 1998 (FARR Act), Pub. L. No. 105-277, Div. G, subdiv. B, title XXII, § 2242, 112 Stat. 2681-822 (8 U.S.C. 1231 note). Section 2242(a) states that it is the "policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." The next subsection directs "the heads of appropriate agencies" to "prescribe regulations to implement the obligations of the United States under Article 3" of the Torture Convention, "subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." § 2242(b), 112 Stat. 2681-822. The FARR Act bars judicial review of those regulations, and it expressly states that the statute does not create jurisdiction for judicial review of claims under the Torture Convention, the statute, "or any other determination made with respect to the application of the policy set forth in subsection (a)," except as part of the review of a final order of removal in immigration proceedings, or if authorized by the implementing regulations promulgated pursuant to the statute. § 2242(d), 112 Stat. 2681-822. With respect to extradition, the Secretary of State has promulgated a final rule that, inter alia, notes the obligations imposed by the Torture Convention, 22 C.F.R.

95.2(a); explains that, in implementing those obligations, the Secretary considers whether it "is more likely than not" that the fugitive will be tortured if extradited, 22 C.F.R. 95.2(b); prescribes the procedures for the Secretary to review allegations of torture, 22 C.F.R. 95.3; and provides that the Secretary's surrender decisions "are matters of executive discretion not subject to judicial review," 22 C.F.R. 95.4.

Congress again addressed judicial review of claims under the Torture Convention when it enacted 8 U.S.C. 1252(a)(4) as part of the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 310. That provision states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28 or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

8 U.S.C. 1252(a)(4).

2. a. In December 2003, the United States Attorney filed a complaint seeking petitioner's extradition to the Philippines on a charge of kidnapping for ransom, pursuant to the United States' extradition treaty with the Philippines. Pet. App. 121a; see Extradition Treaty art. 1, U.S.-Phil., Nov. 13, 1994, 1994 U.N.T.S. 279. After the magistrate judge found probable cause to believe that petitioner committed the charged offense and rejected

petitioner's claim that it had authority to decline to certify extradition based on the Torture Convention, the magistrate judge issued a certificate of extraditability. Pet. App. 121a-122a; see id. at 134a-169a. In July 2008, the district court denied petitioner's petition for a writ of habeas corpus challenging the certificate; the court affirmed the magistrate judge's probable cause finding and concluded that petitioner's claims under the Torture Convention would not be ripe until the Secretary of State made a final extradition decision. Id. at 123a.

Petitioner then submitted evidence to the State Department in support of his claim that he would be tortured if extradited to the Philippines. Pet. App. 170a-176a. After considering petitioner's evidence, see id. at 179a, in September 2008, the Secretary of State issued a warrant to surrender petitioner for extradition. Id. at 123a.

Petitioner filed a second habeas petition, reasserting his claims under the Torture Convention. Pet. App. 123a. The government argued that petitioner's torture-based challenge to the Secretary's surrender determination is not justiciable, relying in part on Munaf, supra, and the REAL ID Act. The district court rejected the government's non-justiciability argument, concluding that it could review the Secretary's extradition decision under the Administrative Procedure Act. Pet. App. 124a, 129a-130a. The district court ordered the Secretary to submit "evidence from the

administrative record sufficient to enable the court to determine whether the Secretary acted arbitrarily in deciding to extradite" petitioner. Id. at 130a. The government submitted a declaration explaining the procedures the State Department follows when considering whether to surrender a fugitive who asserts claims under the Torture Convention. Id. at 132a n.10; Resp. C.A. App. 7-18. But the government declined to provide any State Department records disclosing any diplomatic dealings with Philippine officials concerning petitioner's torture allegations. Pet. App. 132a; see Gov't C.A. App. 77–78. Concluding that it could not determine whether the Secretary's extradition decision was supported by substantial evidence, in November 2009, the district court granted petitioner's habeas petition and ordered his release from custody. Pet. App. 132a-133a.

b. The government appealed. In a brief, unpublished, per curiam opinion, a panel of the court of appeals affirmed. Pet. App. 112a. The panel applied circuit precedent that a Torture Convention claim was subject to judicial review. Id. at 115a-118a (discussing Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1016–1017 (9th Cir. 2000), and Nadarajah v. Gonzales, 443 F.3d 1069, 1075–1076 (9th Cir. 2006)).

The court of appeals granted the government's petition for rehearing en banc, Garcia v. Benov, 636 F.3d 1174, 1175 (9th Cir. 2011), and issued a per curiam opinion vacating the district

court's order and remanding for further proceedings. Pet. App. 3a-6a. The court of appeals held that 28 U.S.C. 2241 provided the district court with jurisdiction over petitioner's habeas petition. Pet. App. 3a-4a. The court concluded that neither the FARR Act nor the REAL ID Act contained the "particularly clear statement" necessary to repeal the courts' habeas jurisdiction. Id. at 4a (quoting Demore v. Kim, 538 U.S. 510, 517 (2003)).

Because the FARR Act and its implementing regulations require the Secretary of State to make a torture determination before surrendering a fugitive who makes a torture claim, the court of appeals held that those provisions create liberty interests cognizable under the Due Process Clause. Pet. App. 4a-5a (citing Matthews v. Eldridge, 424 U.S. 319 (1976) and Goldberg v. Kelly, 397 U.S. 254 (1970)). But, the court determined, that interest is "narrow," requiring only "that the Secretary comply with her statutory and regulatory obligations" to "find it not 'more likely than not' that the extraditee will face torture before extradition can occur." Id. at 5a (quoting 22 C.F.R. 95.2). Concluding that the record contained "no evidence that the Secretary has complied with the procedure" in petitioner's specific case, ibid., the court remanded to the district court to give the Secretary or a senior official designated by the Secretary an opportunity to file a signed declaration stating that the Secretary has complied with her obligations. Id. at 5a-6a.

If the Secretary files such a declaration on remand, "the court's inquiry shall have reached its end" and petitioner's "liberty interest shall be fully vindicated." Pet. App. 6a. The court concluded that petitioner's substantive due process claim is foreclosed by this Court's decision in Munaf. And it determined that the "doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration." Ibid. Accordingly, the court remanded the matter to the district court to give the Secretary an opportunity to file the required declaration, as the government had represented she would. Ibid.

Members of the court filed five concurring or dissenting opinions. One opinion elaborated views consistent with the per curiam opinion concerning jurisdiction and the scope of habeas review. Pet. App. 6a-15a (Thomas, J., concurring). Another dissented from the court's requirement that the Secretary of State file a declaration that she had complied with her statutory and regulatory obligations, finding that inconsistent with the rule of non-inquiry and the principle that, in the absence of clear evidence to the contrary, courts presume that public officials have properly discharged their duties. Id. at 15a-54a (Tallman, J., dissenting). A third and fourth opinion concurred in part but dissented from the court of appeals' holding that district courts may not require the Secretary to do more than file a declaration in

extradition cases in which a fugitive makes torture allegations. Id. at 54a-86a (Berzon, J., concurring in part and dissenting in part); id. at 86a–98a (Pregerson, J., concurring in part and dissenting in part). And the final opinion concluded that the habeas statute did not provide the district court with jurisdiction over petitioner's Torture Convention claims. Id. at 99a-110a (Kozinski, C.J., dissenting in part).

ARGUMENT

Petitioner contends (Pet. 18-23) that the Ninth Circuit's decision violates the Suspension Clause of the Constitution because the court did not provide for judicial review of the substance of the Secretary of State's rejection of a Torture Convention claim. He further argues (Pet. 21-22) that the court incorrectly concluded that Munaf v. Geren, 553 U.S. 674 (2008), forecloses his substantive due process claim. Those contentions lack merit and do not warrant further review.

Neither the Torture Convention nor any implementing provisions provide for judicial review of the Secretary of State's determination that a fugitive will not more likely than not be tortured if surrendered for extradition. And the longstanding rule of non-inquiry, as well as separation of powers considerations, preclude judicial review of a fugitive's claim that, if extradited to face foreign charges, he will be mistreated at the hands of a foreign government. The court of appeals' preclusion of such a

claim thus did not violate the Suspension Clause. Similarly, this Court in Munaf rejected a substantive due process claim where the Executive Branch concludes that an individual is not likely to suffer torture upon surrender to a foreign state, noting that "[t]he Judiciary is not suited to second-guess such determinations -- determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." 553 U.S. at 702.

Petitioner argues (Pet. 13-18) that review is warranted because the Ninth Circuit's jurisdictional holding conflicts with holdings of the D.C. and Fourth Circuits that have found no jurisdiction to review a Torture Convention claim outside the immigration context. But that narrow disagreement does not warrant review in this case because it does not produce substantively different results in the extradition context and because petitioner received more favorable treatment below than he would have in other circuits. Indeed, petitioner received more judicial review than is warranted. He can identify no court that would give him greater review of his Torture Convention claim than did the court below.

Finally, petitioner's claims (Pet. 11-12, 23) that, if left unreviewed, the decision below will lead to an increased likelihood of torture upon extradition is misguided. The United States has a comprehensive and searching process for determining whether a fugitive would face torture if extradited. That process fully

draws upon the foreign-affairs resources of the Executive Branch to protect against the prospect of torture. Judicial intervention into that process is neither necessary nor appropriate. Indeed, it is likely to harm important foreign-relations interests of the United States by interposing substantial delays in effectuating bilateral extradition treaties. Rather than protract the already-prolonged litigation in this case, this Court should deny further review.

1. Petitioner contends (Pet. 18-21) that this Court's review is required because, in his view, the Suspension Clause of the Constitution requires substantive review of the Secretary of State's determination concerning petitioner's likely treatment after extradition. That claim rests on a fundamentally incorrect understanding of the role of habeas corpus in the extradition context. As a matter of history and practice, the role of a habeas court does not extend to issues concerning the treatment a fugitive will receive in a foreign state. Rather, a habeas court's role is the far more limited one of reviewing the complaint, and the supporting showing, to determine that the request falls within the scope of the treaty and that probable cause supports the complaint. See p. 4, supra. Petitioner had full access to the jurisdiction of the habeas court to contest those issues. Indeed, he had further access to a second round of habeas review to present his substantive and procedural due process claims. And petitioner

obtained habeas review of his claim under the Torture Convention and its implementing statutes and regulations as well. That opportunity more than satisfied the Suspension Clause, and petitioner has no right to review of the substance of the Secretary's determination under the Torture Convention.

The writ of habeas corpus cannot be deemed "suspended" unless the petitioner can show that he would have enjoyed a greater degree of review at some earlier time. Petitioner makes no plausible Suspension Clause argument because at no time has this Court ever held that the treatment a fugitive might receive after extradition is a proper subject of judicial inquiry in habeas proceedings; quite the opposite is true. For example, in Munaf, the habeas petitioners contended that a federal court should enjoin their transfer to Iraqi authorities to face trial in Iraqi courts "because their transfer to Iraqi custody is likely to result in torture." 553 U.S. at 700. Relying on principles announced in extradition cases, this Court held that "[s]uch allegations are of course a matter of serious concern, but in the present context that concern is to be addressed by the political branches, not the judiciary." Ibid. The Court explained that, even where constitutional rights are concerned, "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." Id. at 700-701.

The Munaf Court noted that the Solicitor General had represented that "it is the policy of the United States not to transfer an individual in circumstances where torture is likely to result," 553 U.S. at 702, and that such determinations rely on "the Executive's assessment of the foreign country's legal system and . . . the Executive[']s ability to obtain foreign assurances it considers reliable," ibid. (quoting Br. for Federal Parties 47). The Court concluded that "[t]he Judiciary is not suited to second-guess such determinations -- determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." Ibid. "In contrast," the Court explained, "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." Ibid. The Court rejected the view that the government would be indifferent to that prospect, concluding instead that "the other branches possess significant diplomatic tools and leverage the judiciary lacks." Id. at 702-703 (citation omitted).

Munaf built on a longstanding tradition of judicial reluctance to inquire into the treatment a fugitive would face in a foreign legal system if extradited. See, e.g., Neely v. Henkel, 180 U.S. 109, 122 (1901). Applying equitable doctrines that "may require a federal court to forgo the exercise of its habeas corpus power,"

Munaf, 553 U.S. at 693 (citation omitted), the Court concluded that, even in the face of allegations of potential mistreatment by a foreign state, "[d]iplomacy," not judicial review, "was the means of addressing the petitioner's concerns," id. at 701. Thus, as a matter of traditional practice, and reaffirmed in Munaf, no valid claim exists that a habeas court's refusal to second-guess the Secretary of State's Torture-Convention determination violates the Suspension Clause.[3]

Congress did not alter that historic rule by enacting the FARR Act. Congress enacted Section 2242 of the FARR Act to implement the United States' obligations in Article 3 of the Torture Convention. Those treaty obligations are not self-executing and do not themselves provide a basis for judicial review. See p. 6, supra. Section 2242(a) states that it is the "policy of the United

[3] Munaf noted that it did not have before it "a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." 553 U.S. at 702. Nor is that "extreme case" presented here. The United States recognizes its binding treaty obligation under the Torture Convention not to surrender a fugitive who is more likely than not to be tortured in the receiving state. The government argued in the court of appeals that the Secretary's determination that torture is not more likely than not to occur was implicitly reflected in the Secretary's surrender warrant, which petitioner concedes has issued. See Gov't C.A. Reply Br. 8-9; Pet. 6. The court disagreed and remanded for the Secretary to place her finding on the record. Pet. App. 5a-6a. The remand will provide the Secretary the opportunity to make explicit her determination that the United States has complied with its obligations under the Torture Convention, should she determine that current information warrants no change in the decision to surrender petitioner.

States" not to extradite a person where there are substantial grounds for believing the person would be tortured. But statutory "[p]olicy statements are just that -- statements of policy." Comcast Corp. v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010). They create no judicially enforceable rights. See Gonzaga Univ. v. Doe, 536 U.S. 273, 288 (2002) (statutes that "speak only in terms of institutional policy and practice * * * cannot give rise to individual rights") (citation omitted). Other aspects of the FARR Act make clear that Congress did not intend to make justiciable in extradition proceedings claims under the Torture Convention. Congress directed "the heads of the appropriate agencies" to "prescribe regulations to implement the obligations of the United States under Article 3" of the Torture Convention. FARR Act § 2242(b), 112 Stat. 2681-822. The statute shields those regulations from judicial review, and it expressly states that, with the exception of certain immigration proceedings, the statute does not create jurisdiction for judicial review of claims under the Convention, the statute, "or any other determination made with respect to the application of the policy [on torture] set forth in subsection (a)." Id. § 2242(d), 112 Stat. 2681-822; see Munaf, 553 U.S. at 703 & n.6 (reserving the question but noting that "claims under the FARR Act may be limited to certain immigration proceedings."). Thus, the FARR Act does not alter the rule that habeas courts may not consider a fugitive's challenge based on

claims concerning how the fugitive will be treated upon extradition.[4]

Petitioner's reliance (Pet. 19-20) on Boumediene v. Bush, 553 U.S. 723 (2008), as a source of authority to review his Torture Convention claim is misplaced. The Court's conclusion in that case that aliens designated as enemy combatants and held at the Naval facility at Guantanamo Bay, Cuba, may petition for habeas corpus concerning the legality of their detention, id. at 732-733, assured the petitioners only "a meaningful opportunity to demonstrate that [they are] being held pursuant to the erroneous application or interpretation of relevant law." Id. at 779 (emphasis added; citation omitted). The Court did not hold that the Suspension Clause converts provisions that are not judicially enforceable into laws subject to judicial enforcement; indeed, the Court made clear

[4] Amici Legal Historians and Habeas Corpus Experts incorrectly assume that the FARR Act "creates" a judicially cognizable "substantive right barring transfer to torture [sic]," Amici Br. 18, and, for that reason, reach the unfounded conclusion that the Suspension Clause requires judicial review of claims under statute. But because this is not a case in which a fugitive is asserting judicially enforceable legal rights as a basis for challenging extradition, amici's submission lacks merit. For similar reasons, the court of appeals erred in concluding (Pet. App. 4a-5a) that the FARR Act and its implementing regulations give rise to liberty interests under the due process clause that protect a fugitive's right to a particular process. See note 7, infra. But even that holding would not support what petitioner seeks: substantive review of his Torture Convention claim. Pet. App. 6a ("The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary's declaration.").

that its "opinion does not address the content of the law that governs petitioners' detention." Id. at 798. And in light of the fact that the Court decided both Munaf and Boumediene on the same day, it would be surprising if Boumediene silently supplanted Munaf's recognition that a habeas court should not "second-guess" the Executive Branch's determination that a fugitive would be unlikely to face torture if surrendered to a foreign state. Munaf, 553 U.S. at 702. To the contrary, Boumediene made clear that the Court "seek[s] guidance" from history in considering a Suspension Clause challenge and "the specific question before [it]," 553 U.S. at 746, and the relevant history here is the rule of non-inquiry, see United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997). And, while petitioner asserts (Pet. 20) that fugitives enjoy "fewer procedural rights" than the enemy combatants held at Guantanamo Bay, neither class of habeas petitioners may obtain judicial review of the Executive Branch's determination that a detainee is not more likely than not to face torture upon transfer to a foreign government. See Kiyemba v. Obama, 561 F.3d 509, 514 (D.C. Cir. 2009) ("Under Munaf * * * the district court may not question the Government's determination that a potential recipient country is not likely to torture a detainee."), cert. denied, 130 S. Ct. 1880 (2010).

2. Petitioner further contends (Pet. 22-23) that this Court should review the court of appeals' determination that petitioner's

"substantive due process claim is foreclosed by Munaf." Pet. App. 6a. According to petitioner, "[t]he Munaf Court never discussed, much less decided, a substantive due process claim, because the Munaf petitioners only asserted procedural due process challenges." Pet. 22-23. That claim is incorrect. The Munaf detainees' brief repeatedly asserted "a challenge to transfer to foreign custody and the consequent high risk of torture, in violation of the Due Process Clause and Section 2242(a)" of the FARR Act. Br. for Habeas Pet'rs at 17, Munaf, supra, (06-1666); see id. at 51 ("Omar and Munaf have rights under both the substantive component of the Due Process Clause and the FARR Act against transfers to likely torture."); id. at 48 (identifying "[f]reedom from unlawful transfer" as the fundamental liberty interest protected by the Due Process Clause); see also id. at 46-48, 54-55.

It is equally clear that this Court considered and passed on the detainees' claim that their substantive due process rights would be violated if they were transferred to the custody of the foreign government. See, e.g., Munaf, 553 U.S. at 692 ("The habeas petitioners argue that * * * they have 'a legally enforceable right' not to be transferred * * * under both the Due Process Clause and [the FARR Act]."") (citation omitted); id. at 695 ("The habeas petitioners nonetheless argue that the Due Process Clause includes a '[f]reedom from unlawful transfer.'") (citation omitted). Addressing the detainees' torture claims, the Court

rejected the detainees' substantive due process argument, explaining that "[e]ven with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the Judiciary," to assess the detainee's claims. Id. at 700; see also id. at 695-700 (discussing, inter alia, Neely). In contrast, the Court declined to address the FARR Act claim as insufficiently raised. Id. at 703. Thus, the court of appeals correctly recognized that Munaf forecloses petitioner's substantive due process claim. Pet. App. 6a; see Omar v. McHugh, 646 F.3d 13, 21 (D.C. Cir. 2011) ("When the [Supreme] Court addressed the merits of Omar's claim, it rejected his substantive and procedural due process claims.") (citing Munaf, 553 U.S. at 692-703). Further review is unwarranted.

In any event, petitioner's substantive due process claim -- that he has a protected interest in freedom from extradition "to a country where he would face the prospect of torture." Pet. C.A. Supp. Br. 67 -- fails as an original matter. Substantive due process "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997) (citation omitted). The "deeply rooted" principle in history and tradition is that, in extradition cases, the Executive Branch has the exclusive means and competence to assess "whether there is a serious prospect of torture at the hands of an ally, and what to do

about it if there is." Munaf, 553 U.S. at 702; see Neely, 180 U.S. at 122. The Secretary of State will not surrender petitioner absent a determination that it is not more likely than not that he would be tortured if extradited. Here, as in Munaf, petitioner does not face a "more extreme case" in which the government proposes to extradite him even if it is likely that he will be tortured. 553 U.S. at 702. His substantive due process claim therefore lacks merit.

3. Petitioner contends (Pet. 13-18) that this Court should grant certiorari to address two purported circuit splits: one concerning jurisdiction to review Torture Convention claims and the second concerning the scope of review of the Secretary's surrender decision. Petitioner does not stand to benefit from review of his claim of a jurisdictional split, and no court of appeals has granted a greater degree of review than petitioner received here. Indeed, if anything, petitioner received more judicial review than he is entitled to.

a. Petitioner contends (Pet. 13) that the courts of appeals "have reached three different views" on the jurisdiction of habeas courts to consider a fugitive's claims under the FARR Act. The Ninth Circuit in this case recognized such jurisdiction. See Pet. App. 4a. The D.C. and Fourth Circuits, by contrast, found no jurisdiction because (according to the D.C. Circuit) the REAL ID Act precludes judicial review of such claims, see Omar, 646 F.3d at

17-18, or because (according to the Fourth Circuit) the FARR Act precludes such review, see Mironescu v. Costner, 480 F.3d 664, 673-677 (2007), cert. dismissed, 552 U.S. 1135 (2008). In the government's view, the D.C. Circuit correctly determined that the REAL ID Act precludes habeas jurisdiction over petitioner's Torture Convention claim. The REAL ID Act mandates that specified immigration proceedings "shall be the sole and exclusive means for judicial review of any cause or claim under the [Torture Convention]." 8 U.S.C. 1252(a)(4). Congress emphasized the sweep of that restriction by declaring that it applies "[n]otwithstanding any other provision of law (statutory or nonstatutory)," including any "habeas corpus provision." Ibid. The REAL ID Act thus specifically precluded review under any "habeas corpus provision" of a claim under the Torture Convention.[5]

But any disagreement on this point is not properly raised by petitioner because he fared better in the Ninth Circuit than he would have fared in any other circuit on this issue. The Ninth

[5] The court of appeals believed that the REAL ID Act could be plausibly confined to immigration proceedings and thus lacked the "particularly clear statement" required to oust habeas jurisdiction. Pet. App. 4a. But the text of Section 1252(a)(4) is unqualified and cannot be construed as solely addressed to immigration challenges. Moreover, Section 1252(a)(4) would be wholly redundant if it were limited to immigration proceedings in light of the next subsection, which bars habeas review of all claims that could be asserted in a petition for review of a removal order. See 8 U.S.C. 1252(a)(5).

Circuit rejected the government's jurisdictional argument and then turned to the merits of his claims. Petitioner could not have achieved more in any other circuit. And, equally fundamentally, all three circuits have adopted rules under which a habeas court may not review the substance of the Secretary's determination that a fugitive, if extradited, is not more likely than not to be tortured. Pet. App. 6a; Omar, 646 F.3d at 19; Mironescu, 480 F.3d at 676. No substantive conflict exists for this Court to resolve.

b. Petitioner also contends (Pet. 15-17) that the court of appeals' decision created a circuit split with the Fourth, Fifth, Seventh, and Eleventh Circuits because those courts permit judicial review of a fugitive's claim that the Secretary's surrender decision violates the fugitive's constitutional rights. That claim lacks merit; the cases petitioner cites are clearly distinguishable. Each involved a question whether the Executive Branch's own conduct violated a constitutional right, such as the supposed right to a speedy extradition or the benefit of a purported plea agreement to use best efforts to avoid extradition. See Martin v. Warden, Atlanta Pen., 993 F.2d 824, 829 (11th Cir. 1993); In re Extradition of Burt, 737 F.2d 1477, 1486-1487 (7th Cir. 1984); Plaster v. United States, 720 F.2d 340, 348 (4th Cir. 1983); In re Pet. of Geisser, 627 F.2d 745, 749-750 (5th Cir. 1980), cert. denied, 450 U.S. 1031, and reh'g denied, 451 U.S. 1032. None of those cases conflicts with the Ninth Circuit's

recognition that habeas courts may not consider the treatment a fugitive likely will receive upon extradition. Indeed, many of the cases on which petitioner relies expressly note that principle. See Martin, 993 F.2d at 829-830 (discussing Neely); Burt, 737 F.2d at 1485 & n.11 (same); Plaster, 720 F.2d at 349 & n.9 (same).[6] Petitioner has identified no circuit split requiring this Court's intervention.

4. Finally, petitioner contends (Pet. 10-12) that this Court's review is warranted because, in his view, absent judicial oversight of the Secretary of State's implementation of the Torture Convention, individuals facing extradition will experience an increased likelihood of torture. He claims that the separation of powers mandates judicial review in order to maintain proper checks and balances. Petitioner's claims are unfounded. Given that courts have never played a role in reviewing a fugitive's likely treatment by a foreign state if surrendered on an extradition warrant, petitioner's suggestion that the decision below

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[6] Petitioner notes that some courts of appeals have speculated, in dicta, on a possible "humanitarian exception" that would permit courts to second-guess the State Department's determination of a fugitive's likely treatment upon extradition. Pet. 16 n.6. But as petitioner recognizes, "no court has ever granted relief." Ibid. Thus, no conflict exists for this Court to resolve. In any event, those cases predate Munaf's recent reiteration that habeas corpus is not a valid means for reviewing a fugitive's treatment claims, 553 U.S. at 700, and courts can be expected to adhere to that holding in future cases. Review at this time to address this issue is unnecessary.

"abdicate[s]" the role of the courts (Pet. 12) is misguided. Indeed, judicial review of the treatment that a fugitive is likely to receive in a foreign state -- after the Secretary of State has determined that torture is not more likely than not to occur -- itself would threaten to disrupt the proper balance between the branches by requiring the judiciary to pronounce foreign-policy judgments that are the province of the political branches. Munaf, 553 U.S. at 702.

Significantly, the government is, as this Court recognized in Munaf, not "oblivious" to concerns about possible torture. 553 U.S. at 702. Under the regulations that implement the FARR Act, "[i]n each case where allegations relating to torture are made," the "appropriate policy and legal offices" in the State Department "analyze information relevant to the case in preparing a recommendation to the Secretary as to whether to sign the surrender warrant." 22 C.F.R. 95.3. A State Department declaration filed in this case elaborated that State Department offices such as the "Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports," as well as regional offices and bureaus, which have direct knowledge of country conditions, are integral to the State Department's analysis. Gov't C.A. App. 11-12. The Department also examines materials submitted by the fugitive as well as by others submitted on the fugitive's behalf. Id. at 12. That process took place in this case. Pet.

App. 179a (noting the State Department's receipt and consideration of petitioner's letter and six volumes of exhibits). Based on the State Department's analysis, "the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions." 22 C.F.R. 95.3(b).[7]

[7] The court of appeals fundamentally erred in determining that these regulations "generate interests cognizable as liberty interests," protected by due process. Pet. App. 4a-5a (concluding that petitioner had a procedural right to have "the Secretary comply with her statutory and regulatory obligations"). For this proposition, the court cited two decisions that held that particular government entitlement programs generated property interests. Id. at 5a (citing Mathews v. Eldridge, 424 U.S. 319 (1976) and Goldberg v. Kelly, 397 U.S. 254 (1970)). But even mandatory statutes do not necessarily create property interests supporting a right to some process. See Town of Castle Rock v. Gonzales, 545 U.S. 748, 765 (2005) ("Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people."). Similarly, mandatory regulations do not automatically create liberty interests. See Sandin v. Conner, 515 U.S. 472, 482 (1995) (holding that constitutionally protected liberty interests were not created by mandatory prison regulations because, inter alia, "[s]uch guidelines are not set forth solely to benefit the prisoner"). Here, the relevant regulations serve an independent government purpose: to provide procedural regularity for the Secretary's fulfillment of the United States' obligations under the Torture Convention and its implementing statute. Nothing justifies creating individual constitutional rights out of regulations that implement the non-self-executing Torture Convention (see Medellin v. Texas, 552 U.S. 491, 522 n.12 (2008) (citing Pierre v. Gonzales, 502 F.3d 109, 119-120 (2d Cir. 2007)), and FARR Act, which declares only the "policy" of the United States not to extradite a person where that individual is likely to be tortured. FARR Act § 2242(a), 112 Stat. 2681-822.

The State Department declaration in this case unequivocally represents that "[t]he Secretary will not approve an extradition whenever she determines that it is more likely than not that the particular fugitive will be tortured in the country requesting extradition." Gov't C.A. App. 12. On a case-by-case basis, the Secretary may determine that obtaining specific assurances from the requesting country concerning the humanitarian treatment of the fugitive will sufficiently mitigate any concerns about possible torture. Id. at 12-13. In considering the efficacy of assurances, State Department officials, "including the Secretary," consider the political and legal context in the requesting state and may also make judgments about "the requesting State's incentives and capacities to fulfill its assurances to the United States." Id. at 13.[8] In appropriate cases, the State Department monitors or arranges for monitoring of the condition of the fugitive after extradition. Ibid. To function effectively, these sensitive processes require confidentiality. See id. at 16 ("Consistent with the diplomatic sensitivities that surround the Department's communications with requesting States concerning allegations

[8] Cf. Jiminez v. United States Dist. Court for S. Dist. of Fla., 84, S. Ct. 14, 19 (1963) (Goldberg, J., in chambers) (denying stay of extradition; noting commitment by foreign government to State Department to take appropriate steps "to eliminate any risk of physical harm" to fugitive) (citation omitted).

relating to torture, the Department does not make public its decisions to seek assurances in extradition cases.").

More broadly, the Executive Branch recently conducted a comprehensive review of the United States' transfer policies to ensure compliance with the United States' obligations under the Torture Convention. In Executive Order 13491, the President directed the creation of a Special Interagency Task Force on Interrogation and Transfer Policies. 74 Fed. Reg. 4894-4895 (Jan. 22, 2009). The Task Force was chaired by the Attorney General, and included the Secretary of State along with other cabinet officials. Its mission was, among other things, "to study and evaluate the practices of transferring individuals to other nations" to ensure compliance with domestic and international law and United States policy not to transfer individuals to face torture, and to make recommendations to the President concerning those practices. Id. at 4895.

The Task Force recognized that the Executive Branch sometimes relies "on assurances from the receiving country" when considering whether transfer would be consistent with United States law and policy and international obligations concerning humane treatment. Department of Justice, Press Release, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009), http://www.justice.gov/opa/pr/2009/August/09-ag-835.html. The Task Force made recommendations "aimed

at clarifying and strengthening U.S. procedures for obtaining and evaluating those assurances," including the recommendation that the State Department be involved in evaluating assurances in all cases and that the inspectors general of the Departments of State, Defense, and Homeland Security prepare an annual report on transfers conducted in reliance on assurances. Ibid. The Task Force also made recommendations "aimed at improving the United States' ability to monitor the treatment of individuals transferred to other countries," including a recommendation "that agencies obtaining assurances from foreign countries insist on a monitoring mechanism * * * to ensure consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government." Ibid. The President accepted the Task Force's recommendations, and the government is implementing them.

These processes confirm that "the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." Munaf, 553 U.S. at 702; cf. Pasquantino v. United States, 544 U.S. 349, 369 (2005) (holding a prosecution brought by the Executive Branch posed "little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns"; "The greater danger, in fact, would lie in our judging this prosecution barred based on * * * foreign policy concerns * * * that we have

neither aptitude, facilities, nor responsibility to evaluate.") (citation and internal quotation marks omitted). Further review of the decision below, entrusting to the Executive Branch the responsibility to make these sensitive decisions without judicial oversight in the extradition context, is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

STUART F. DELERY
Principal Deputy Assistant
Attorney General

ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys

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